Nos. 17460-17461

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

L. SYMES, *et al.*,

Appellees.

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

ATLAS ASSURANCE COMPANY, *et al.*,

Appellees.

APPELLANTS' BRIEF

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR APPELLANTS, PACIFIC QUEEN FISHERIES, et al.

Jurisdiction

The jurisdiction of this Court rests upon 28 U. S. C. § 1291 by reason of a Notice of Appeal, filed April 14, 1961 (R. Vol. 1, p. 296) from a Final Judgment for defendants filed and entered March 23, 1961 (R. Vol. 1, pp. 288-290).

Original jurisdiction of these cases was vested in the District Court under the provisions of 28 U. S. C. § 1332 by reason of diversity of citizenship and amounts (R. Vol. 1, p. 249). Although the pleadings passed out of the case upon the

entry of Pre-Trial Order Number One (R. Vol. 1, p. 221), the pleadings will be referred to later in this brief in connection with discussion of the denial of jury trial by the District Court.

Questions Presented

Pacific Queen Fisheries, a partnership, owned the diesel fishing vessel *Pacific Queen* which became a constructive total loss on September 17, 1957 (R. Vol. 1, pp. 198-199). Prior to her loss, Pacific Queen Fisheries, hereinafter sometimes referred to as "Fisheries," obtained insurance insuring *Pacific Queen* against loss in the sum of $325,000 and each of several gillnet fishing boats carried aboard in the agreed amount of $5,000 each (R. Vol. 1, p. 199). Following the loss of the vessel, two of her gillnetters and damage to a third gillnetter, Fisheries furnished defendant insurers, hereinafter sometimes referred to as "Insurers", proof of the aforementioned losses and abandoned the vessel to defendants (R. Vol. 1, p. 199). Insurers agreed that the vessel was a constructive total loss, but declined tender of abandonment (R. Vol. 1, pp. 199-200). Insurers have not paid to Fisheries any part of the insurance on *Pacific Queen,* or on two lost and one damaged gillnetter, although payment has been duly demanded (R. Vol. 1, p. 201).

Insurers raised the following alleged legal defenses in substantiation of their position that the losses were not covered by the insurance:

1. Fisheries concealed from Insurers circumstances material to the risk.

2. The *Pacific Queen* was, with the privity of the assureds, sent to sea in an unseaworthy state.

3. The loss and damage resulted from want of due diligence by the owners of the vessel.

4. Fisheries breached an implied warranty that the adventure insured was a lawful one, and that, so far as the

assureds were able to control the matter, the adventure was to be carried out in a lawful manner.

Whether or not any of these defenses may stand, under all the circumstances of this case, is the basic question presented on this appeal. Collateral questions include whether or not a contractual time bar advanced by one of the Insurers should be given effect and whether plaintiffs were rightfully denied a trial by jury.

Statement of the Case

1. The Opinion, the Findings and the Testimony

As far as possible the circumstances surrounding the destruction of *Pacific Queen* will be recounted from facts found by the District Court and from testimony given at the trial considered by the District Court to have been credible and authoritative. In addition to citing page numbers in the Record, we shall indicate the sources of the evidence cited wherever possible.

The lower court, in its Finding of Fact No. 7 (c) (R. Vol. 1, pp. 254-255), stated:

> "Upon a careful examination of all of the proceedings before the Coast Guard, and of various depositions received in evidence in these cases, and upon hearing, observing and weighing all of the evidence of the witnesses who testified at the trial of these cases, the Court finds that the substance of said Findings of Fact and Conclusions (of fact) of the Coast Guard (Ex. 30, 31, 32) are true and correct, and hereby incorporates them by reference and adopts them as its own."

Although we do not agree with certain conclusions of fact reached by the Coast Guard investigator, we shall refer liberally to his report (R. Vol. 3, pp. 1051-1087) in making our

statement of the pertinent facts, using the abbreviation "C. G." to indicate that this report is being cited. Where the Court's opinions or its Findings of Fact or Conclusions of Law are cited, the abbreviations "Op.", "F. F.", and "C. L." will be employed, respectively.

2. The Facts

The *Pacific Queen,* owned and operated by Pacific Queen Fisheries of Tacoma, Washington, a partnership, was built in 1943 and, at the time of her loss, was licensed for the fishing trade. She was built of wood and steel, was propelled by twin screw diesel engines, had a registered length of 173 feet, a beam of 37 feet, a depth of 18.8 feet, and a gross tonnage of 988 tons (C. G., R. Vol 3, pp. 1052-1053). She had originally been constructed for the United States Navy as a salvage vessel, but, after being bought as war surplus from the government in 1948 by an individual who resold her to Pacific Boatbuilding Company, a corporation then controlled by one of Fisheries' partners, which, in turn resold the vessel in 1949 to Fisheries (F. F., R. Vol. 1, pp. 252-253), the vessel was converted for use as a "mother ship" for a fleet of gasoline powered gillnet motorboats (C. G., R. Vol. 3, p. 1054).

The vessel possessed several brine tanks and refrigerated holds for the purpose of freezing the catch. The freezing was accomplished through the use of an ammonia refrigeration system which used approximately 700 pounds of ammonia (C. G., R. Vol. 3, pp. 1054-1055). *Pacific Queen* was also equipped to carry, in four steel tanks located below deck in the after end of the vessel, gasoline to be utilized by her gillnetters during fishing operations (C. G., R. Vol. 3, pp. 1058-1059). Of the four steel gasoline tanks, the two after ones were originally Navy equipment. The two forward ones were installed after purchase from the Navy and were originally intended for and used for the purpose of carrying additional diesel fuel. Although the exact date has never been estab-

lished, sometime before the beginning of the 1957 Fishing season, and possibly as early as 1955, the two forward tanks were emptied of their diesel fuel, connected with the two after tanks to enable all four to carry gasoline and the tanks' discharge systems were altered to what the lower court considered a more "hazardous" method of discharge (F. F., R. Vol. 1, pp. 259-260). A more detailed picture of *Pacific Queen*'s construction characteristics will be set out in following sections of this brief and will be clarified at the time of oral argument through the use of a large model which was admitted as an exhibit at the trial.

Beginning in 1950, Fisheries operated *Pacific Queen* between Puget Sound and Bristol Bay, Alaska, as a refrigerated vessel to freeze and transport catches of salmon from Alaska to ports on Puget Sound, Washington. Until 1951, regulations of the U. S. Fish and Wildlife Service prohibited the use of power-driven fishing boats in Bristol Bay. This was a fish conservation measure. In 1951, this regulation was relaxed and power boats up to 32 feet in length were permitted (F. F., R. Vol. 1, p. 255). During the years beginning at 1950, Fisheries insured the vessel with various insurance companies including some of the defendants which insured the vessel in 1957 (F. F., R. Vol. 1, p. 256). The *Pacific Queen* did not engage in Alaska operations in 1956, but remained in lay-up status (F. F., R. Vol. 1, p. 258).

The *Pacific Queen* commenced outfitting preparations for the 1957 Alaskan fishing season at Tacoma, Washington, during the month of April, 1957 (C. G., R. Vol. 3, p. 1060). Incident to the procurement of insurance for the 1957 season, a condition survey of the *Pacific Queen* was made by a representative of United States Salvage Association (F. F., R. Vol. 1, p. 258) and insurance certificates were issued and delivered, the premium being paid in full (Op., R. Vol. 1, p. 230). Around the 25th of May, 1957, the vessel proceeded to Seattle, Washington. During the period 25th to 27th May, 1957, the vessel completed her outfitting and, as a part of these preparations, the vessel loaded approximately 7,510

gallons of gasoline in bulk at the Shell Oil Fueling Dock on Harbor Island. This gasoline was loaded into the four underdeck steel tanks previously referred to (C. G., R. Vol. 3, p. 1060).

On May 27th, the vessel took its departure from Seattle and proceeded to Alaskan waters (C. G., R. Vol. 3, p. 1060). While operating in the Bristol Bay area, the gillnetters, each manned by a crew of fishermen, periodically departed from the mothership, brought in a catch, returned to the mothership which relieved them of their cargoes of fish, refueled from her gasoline supply and were sent back out for more salmon. (C. G., R. Vol. 3, p. 1054). Refueling was accomplished by means of an electrically powered gasoline pump which took suction from any one of the four internal tanks through a neoprene hose (C. G., R. Vol. 3, p. 1059).

Upon completion of the fishing season, the vessel left Alaskan waters and proceeded to the Puget Sound area, where, on or about August 17, 1957 she commenced off-loading gear and fish at various points in the Seattle-Tacoma area (C. G., R. Vol. 3, p. 1060. As the insurance certificates contain a warranty that the vessel be "laid up nine (9) consecutive months at Port of Seattle, Washington" (R. Vol. 1, p. 84), an additional 30 day period of insurance coverage was obtained on September 5th (R. Vol. 1, p. 84) in order to ensure operating insurance coverage during a period when the *Pacific Queen* would be broken out of lay-up for further discharging of fish and gear (Galbreath, R. Vol. 2, pp. 777, 793-794).

The next day the vessel proceeded to Friday Harbor, San Juan Islands, Washington, and tied up at the Friday Harbor Packing Company pier where she remained unloading fish until the evening of September 11th. At approximately 0500 hours on the morning of September 9th (Petrich, R. Vol. 2, pp. 547-548, as to date) the vessel's cook, Hutton, in the course of arising to commence preparations for breakfast, noticed the odor of gasoline fumes. A brief investigation on

his part disclosed that the area of the first deck around the gasoline tanks in the stern portion of the ship appeared to be covered with several inches of gasoline. Hutton immediately advised the personnel of the ship, and Radin (the Captain) and Jasprica (the Chief Engineer), when apprised of the situation, ordered the crew off the vessel. No power equipment was started up. In excess of 100 gallons of gasoline were spilled from one of the gasoline tanks in the reefer flat area and this gasoline passed through apertures of the first deck into the shaft alley recess beneath. Radin and Jasprica, together with selected members of the crew, then took steps to remove the gasoline from the shaft alley recess (C. G., R. Vol. 3, pp. 1060-1061). These steps were described in the Coast Guard report (C. G., R. Vol. 3, pp. 1061-1062) as follows:

> "* * * In an attempt to rid the reefer flat and shaft alley bilge areas of gasoline, cold water, sprayed through a hose, was used to wash down the area. After removal of visible traces of gasoline the area involved was again washed down with cold water, and a bilge cleaning solvent was used in an effort to remove the gasoline from the wooden hull. Portable blowers were used to remove the gasoline fumes from the vessel, one of these blowers being borrowed from the Friday Harbor Volunteer Fire Department. On the evening of 10 [9?] September, 1957, the vessel's main engines were started and the ship's ventilation blowers were placed into operation to free the vessel from gasoline fumes."

Plaintiff August Mardesich was the Manager of the *Pacific Queen* in 1957, although he was not quartered or employed aboard the vessel in any capacity, (F. F., R. Vol. 1, p. 261). In fact, during the fishing season of 1957, he sailed aboard another freezer vessel, *North Star,* and had been its Manager from 1951 through 1957. His managerial role in connection with *Pacific Queen* was primarily in the realm of finance and banking (Mardesich, R. pp. 325, 337, 1608, 1637). Mardesich,

who had come to Friday Harbor on the day of the gasoline spill to check on the amount of fish being off-loaded and canned at a nearby cannery, went aboard *Pacific Queen* at which time Jasprica informed him of the spill (Jasprica, R. Vol. 4, p. 1553). Mardesich, in the company of Jasprica, then inspected the lower spaces of the vessel and surveyed, to his satisfaction, the steps that had already been taken to purge the vessel of the spilled gasoline (Mardesich, R. Vol. 3, pp. 979-982; Jasprica, R. Vol. 4, p. 1582).

On the evening of September 11th, the vessel departed Friday Harbor and proceeded to the Seattle area where it unloaded fish for Helvita Food Products (Jasprica, R. Vol. 2, p. 557), eventually tying up at the Ballard Oil Dock on Lake Union. On September 15th *Pacific Queen* left Seattle and proceeded to Tacoma where she tied up at "Old Town Dock" at approximately 1635 hours. The remainder of the vessel's crew was paid off, the majority of the crew having left the vessel prior to the move to Tacoma. Three men—Jasprica, Medak and Weber—remained on the vessel for the purpose of securing the ship and preparing her for winter storage (C. G., R. Vol. 3, pp. 1062-1063).

The next day, September 16th, the three men worked on and about the ship and the main engine plant was started up in order that light and power be available (C. G., Vol. 3, p. 1063-1065). Part of the work accomplished on board this day included the removal of one of the vessel's auxiliary ship's service diesel generator units which was located on the upper platform of the engine room on the port side at approximately frame No. 52. The description of the removal of this diesel engine in the Coast Guard report is found at pages 1065-1066 of the Record as follows:

> "* * * The generator portion of this unit had been removed prior to this time while the vessel was laying in Friday Harbor, Washington, and it was the intention of the men at this time to remove the diesel engine. In order to do this, it was found necessary

to remove a steel oil guard which ran around the unit on the deck and extending up some three inches for the purpose of retaining spilled oil, etc., in the neighborhood of the set. In the course of this work, Weber brought down the ship's oxygen-acetylene hose, torch and associated equipment. The combination oxy-acetylene hose led up from the engineroom to the port side of the main deck aft on the after corner of the superstructure house where it connected to the vessel's oxy-acetylene bottles which were installed at this point by the use of brackets, etc. At approximately 1430 hours, Weber commenced cutting off the oil guard on the deck around the auxiliary diesel generator unit. In the course of this, sparks from the cutting work went down through the upper steel platform deck of the engineroom and fell onto one of the structural wooden beams of the vessel which ran underneath the upper level deck. The sparks were able to pass through the upper deck plating of the engineroom because of the fact that holes had been cut in this plating, irregularly spaced, at some prior time to permit the flow of grease, oil, etc., from the upper level down into the bilges of the engineroom. This was accomplished in the manner described previously for the reefer flat deck area. There was a rag laying on the top of this beam and as a result of the sparks down in this area, the rag was ignited. Jasprica was in the lower level of the engineroom at this time and, observing the fire, obtained a portable CO_2 fire extinguisher and used it to extinguish the fire. In addition to this, Medak who was on the upper level with Weber used a two-gallon bucket of water and poured it on the upper deck in way of the cutting work. Shortly after this, with no further incident, the removal of the oil guard was completed and at about 1700 hours the three men secured for the day. * * *"

After securing the main plant, the men made preparations to go ashore. The shore power connection was not con-

nected on board the ship at this time as Medak suggested that the vessel's lights might attract passers-by to the ship. The three men proceeded ashore together in the early evening, Jasprica and Medak returning at 2215 hours (C. G., R. Vol. 3, p. 1067). According to the sworn statement given by Medak at Police Headquarters immediately following the loss of the vessel, which statement is an exhibit to Exhibit 391 (deposition of the Coast Guard investigator):

> "Jasprica said good-night, left the ship to spend the night with his mother and I went to my bunk and went to bed. I do not know whether Weber had returned to the ship as I didn't look in on him before retiring."

It is known that Weber spent some time in the Spar Tavern, a beer tavern located near the city dock. At approximately 2200 hours Weber left the tavern with the announced intention of returning to the *Pacific Queen* (C. G., R. Vol. 3, p. 1067).

The Coast Guard report continues at page 1067 of Volume 3 of the Record:

> "At approximately 0400 hours on the morning of 17 September, 1957, a violent explosion occurred on board the *Pacific Queen*. This explosion hurled portions of the vessel several hundred yards away, broke plate glass windows in various establishments in the surrounding area, and was felt as a distinct jar by members of the crew of Brown's Point Light Station, across Commencement Bay to the northeast, some two miles distant."

This explosion ripped open the vessel's hull planking on the port after side of the engineroom at the turn of the bilge and a large section of the vessel's main deck aft of the superstructure, together with associated equipment such as brine tanks, hatches, manhole covers and a gillnet boat, was blown off and into the water. Smoke and flames arose from the vessel just aft of her superstructure, and, in a very short

time, spread from the after end of the superstructure all the way back to the vessel's stern (C. G., R. Vol. 3, p. 1068). *Pacific Queen* ultimately settled on the bottom with a 10° list to the starboard (C. G., R. Vol. 3, p. 1070).

The explosion had originated in the upper level of the engineroom at approximately the level of the catwalk, in the neighborhood of the forward corner. The source of ignition for the explosion is not known at the present time, and, in all probability, never will be determined (C. G., R. Vol. 3, p. 1082). In the words of the lower court's Findings of Fact, (R. Vol. 1, pp. 269-270) "[i]t could have been a spark from a cigarette, or a match, or an electrical contact, or other accidental source."

Specification of Errors

Forty-eight alleged errors on the part of the lower court have been specified in our "Statement of Points" found at Volume 1, pages 297a-297h, of the Record. Of these, only Nos. 1, 3, 14 and 47 are no longer considered germane to this appeal, and the rest are incorporated by reference herein as if fully set forth. In the argument following hereafter, many of the specified errors will be consolidated under certain main points of argument.

Statement Concerning the Law Applicable

The lower court, a little over a month in advance of the commencement of the trial, passed upon the effect of the following provision found in the American Hulls (Pacific) clauses which are attached to the certificate of insurance covering the hull (R. Vol. 1, p. 83) and to one of the policies (R. Vol. 1, p. 75):

> "(c) Warranted to be subject to English Law and usage as to liability for and settlement of any and all claims."

The trial judge's memorandum decision on this question may be found at pages 224-226 of the record and his con-

clusion of law, following the trial, that "English Law and Usage Governs" is set out at pages 279-280 of the record.

Plaintiffs do not dispute that the highest court of the State of Washington has sanctioned stipulations for foreign law, under certain circumstances, as has the United States Supreme Court. See: *Crawford* v. *Seattle R. & S. R. Co.,* 86 Wash. 628, 150 P. 1155, L. R. A. 1916 D; *Lesicich* v. *North River Insurance Co.,* 191 Wash. 305, 71 P. 2d 35 (1937); *London Assurance Co.* v. *Companhia de Moogens do Barreiro,* 167 U. S. 149 (1896). As stated in a Note at 62 Harv. L. Rev. 647 (1949) discussing stipulations in contracts as to governing law:

> "To some extent every state has given recognition to the expressed or implied intent of the parties."

The author of this Note, states, however, at page 651:

> "In insurance contract cases, as a logical consequence of the unequal bargaining atmosphere, the courts have shown unusual solicitude for the interest in protecting the resident insured from foreign insurance corporations."

In a recent federal case, *Landry* v. *SS Mutual Underwriting Association,* 177 F. Supp. 142 (D. C. Mass. 1959), affirmed 281 F. 2d 482 (1st Cir. 1960), the court, in construing a P & I policy on a Massachusetts fishing vessel, found that English law governed the interpretation and construction of the contract. The court stated at page 146, however, that "since there do not seem to be any English authorities which are precisely in point, the substantive questions must be resolved largely upon general principles of construction which are not different in England from those used in this country."

With the above in mind, this brief will cite American authority where it is felt that English law has not adequately covered the field in question or where the American law affords a supplementary view.

ARGUMENT

I

The Court erred in failing to conclude that Insurers had the burden of showing the source of ignition which they admit they failed to show.

In *Hart-Bartlett-Sturtevant Grain Co.* v. *Aetna Ins. Co.*, 293 S. W. 2d 913 (Sup. Ct. Utah 1956), where the assured brought an action on policies covering loss of grains and loss due to interruption of business resulting from an alleged explosion, the court, at page 922, stated:

> "Plaintiff had only the burden of proving there was an exlosion. Plaintiff did not have any burden of proving in what particular way the explosion was caused."

The *Hart* case cited *Hartford Fire Ins. Co.* v. *Empire Coal Min. Co.*, 30 F. 2d 794 (8th Cir. 1929), which construed an insurance policy as covering damages resulting from an underground explosion, rather than damages resulting only from inability to maintain pumping service. The Court in this case, at page 801, considered the matter of presumptions in explosion cases as follows:

> "* * * It is further contended by counsel for defendant that the jury could not have reached the conclusion that there was an explosion without basing presumption upon presumption, and that this is not allowable. The rule cited is well established, but we think it is not applicable to the case at bar. The contention of counsel confuses the question, was the fire caused by an explosion? with the entirely different question, in what particular way was the explosion caused. It was incumbent on the plaintiff to prove the affirmative of the former question. No burden rested upon the plaintiff to answer the latter question. The answer to the second question might involve not only numerous facts, but also several presumptions. The answer to the first question involved a single inference from numerous established facts. * * *"

As has been stated, no one, including the lower court, claims to know the source of ignition for *Pacific Queen's* explosion. One possible candidate, arson, was peremptorily excluded by the lower court (F. F., R. Vol. 1, p. 269), in spite of the existence of startling circumstantial evidence, which evidence will be reviewed hereunder.

Medak, in his sworn statement (Exh. No. 4 to trial Exh. No. 391) given at Police Headquarters only six hours after the explosion, stated:

> "The next thing I remember was being blown out of my bunk at the time of a loud explosion. Mine is the only bunk in the room as it is a very small room. The door was jammed with debris and I had a hard time getting it to open. By this time, the flames were coming in the port hole on the deck side of the ship and I barely got out without getting burned. I went into the passage way and the flames were so bad on the deck side that I had to go the other way. On reaching the starboard side, I heard Webber screaming, 'Please help me out—break the door in'. I tried to force the door but it was apparently blocked by something and would not give. Then I didn't hear anymore from Webber. His room is on the starboard side and way back along side the stack where the blowers and exhaust system is located. In order for him to escape, he would have had to go through a stateroom containing four bunks to get into the passageway. When I got out in front of the cabins, there were two young men standing *on deck* by the fish hold and they asked me how many men were on the boat and whether I needed help. * * *" (Emphasis added.)

One of these men was subsequently identified as Donald R. Dahl of Tacoma, Washington (C. G., R. Vol. 3, pp. 1078-1079), a man that the Tacoma fire department and police had had under suspicion and surveillance in connection with

other fires in the city of Tacoma (Heymel, R. Vol. 4, pp. 1489-1490). Mr. R. K. Heymel, Deputy Fire Marshal of Tacoma and one of Insurers' expert witnesses, testified as follows at pages 1490, Vol. 4 of the Record:

> "A. One, we can suspect him of most any fire downtown, because he is a night rover, and he is there among the first group that shows up at a fire.
>
> Q. Would that be Mr. Dahl?
>
> A. Mr. Dahl."

The Tacoma Police Department "Information Report" (C. G., R. Vol. 3, p. 1086) which is Exhibit No. 12 of the Coast Guard investigator's report, contains much that substantiates Mr. Heymel's comments concerning Mr. Dahl and which makes one "really wonder". This report, in part, reads as follows:

> "* * * NASH & SAMEUELSON [Police Officers] ran out onto the dock and noted 4 persons out on the North end of the dock about 75 feet from the boat which was burning. One of these 4 was DON R. DAHL, TFD 9961; a second party was later identified as NICK T. MEDAK, seaman from the *"Pacific Queen"* which was burning, a third party was a sailor in blue uniform and the fourth party was an unidentified civilian. * * * At 4:12 A.M., Officer NASH called Sgt. DESKINS attention to DON R. DAHL who was wandering around near the South End of the dock approach. Both NASH and Sgt. DESKINS noted that he was intoxicated and Sgt. DESKINS recognized this subject from past arrests. He was immediately taken into custody, shaken down, and questioned as to his presence at the scene. At first DAHL refused to identify himself, stating 'Chief Fisk knows me' [Tacoma Fire Chief. See: R. Vol. 3, p. 1016]. When asked to explain his presence, he stated to NASH & DESKINS that he had been driving north on MCCARVER St. and when he crossed No. 30th St., the

> explosion occurred aboard the *"Pacific Queen."* He stated he immediately drove his car, a 1949 Lincoln Fordor Sedan, Lic 13461 B, Grey in color, out onto the dock and up next to the burning ship. He then stated he boarded the ship and attempted to help someone else on board free a trapped man, but being unsuccessful, he left the ship and drove his car back out to the dock approach. He then stated he ran back out onto the dock. When queried as to where he had been before he drove his vehicle out onto the dock, DAHL said 'Do I have to tell you that?' When answered in the affirmative, he refused to state any of his movements prior to arriving at No. 30th and McCarver. He did state, in answer to a question, that he had had 'Two drinks' earlier in the evening, but steadfastly denied being intoxicated.
>
> DAHL staggered when walking, his eyes were glassy, and he smelled of intoxicants * * *.
>
> It should also be noted that DON R. DAHL insisted two or three times that his name be kept out of any publicity surrounding the fire, but did not explain his request. * * *"

Not having established any particular source of ignition, the burden rests on Insurers to exclude, by a preponderance of evidence, all reasonable theories advanced by the assureds as to this source. The fact that such a theory is based upon circumstantial evidence should not detract from its weight. Insurers have not even made a try at rebutting, with concrete evidence, the inference of arson which has been raised.

The insurance certificates at issue contain, in part, the following clause (R. Vol. 1, p. 74), commonly found in English policies, enumerating many of the areas of the certificates' coverage:

> "Touching the Adventures and Perils which we, the said Assurers, are contented to bear and take upon us,

> they are of the Seas * * * Fire * * * and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel &c., or any part thereof."

Arson is a covered peril under the above wording. As stated by Lord Summer in *Samuel* v. *Dumas,* (1924) A. C. 431, 466:

> "A ship is none the less burnt and destroyed by fire because the striking of a match was an act of arson."

See *Arnould on Marine Insurance,* 15th Ed., Vol. 2, p. 774, footnote 88. That such a fire precipitated an explosion and further fire would in no way detract from the coverage.

II

The Court's finding that the destruction of the vessel was the result of a gasoline explosion is clearly erroneous.

The lower court stated in its oral opinion (R. Vol. 1, p. 243) that "[i]t was a gasoline explosion according to the overwhelming preponderance of the evidence that has been submitted to me." For the purposes of the argument under this point, and others to follow in this brief, we shall assume that arson, as a possible cause, has been excluded as a reasonable possibility, although, in actuality, we feel that such is not the case.

In determining what fuel fed the explosion, it is important to consider in further detail the various equipments carried on board *Pacific Queen* and the nature and the extent of the shipboard damage caused by the explosion. The vessel's four internal gasoline tanks were found to be unruptured, with no evidence of explosion or fire damage (C. G., R. Vol. 3, p. 1074). The reefer flat area in general, where these tanks were located, with the exception of the overhead, showed relatively little fire damage except on the deck area

in line with the after watertight door to the engine room (C. G., R. Vol. 3, p. 1077). The ship's ammonia receivers, located in the shaft alley into which gasoline was spilled at Friday Harbor, showed no evidence of fire or explosion damage (C. G., R. Vol. 3, p. 1073). Mr. Knisely, one of Insurers' expert witnesses, examined the ammonia refrigeration system on the *Pacific Queen* after the explosion and "found the pressure vessels, the chambers that held ammonia and ammonia gas intact, but *the piping was badly broken up.*" (R. Vol. 2, pp. 673-674). (Emphasis added.)

The explosion, it must be remembered, originated in the upper level of the engine room, at approximately the level of the catwalk, in the neighborhood of the forward port corner (C. G., Vol. 3, p. 1082). At the trial, one of the assureds' experts, Captain Francis W. Buckler, to whose factual testimony Captain Lees, Insurers' corresponding expert, expressly agreed in all particulars (R. Vol. 1, p. 369), was asked to describe a photograph taken in the engine room. His description reads:

> "This photograph is taken in the port forward upper area of the engine room showing the port side of the bulkhead blown into the cargo compartment away from the engine room, numerous courses of piping and lines hanging with a ruptured ammonia line coming into the port side."

This line, observed Captain Buckler, "comes out of the refrigeration system from the cargo hold" (R. Vol. 1, pp. 386-387). There were "slight indications of melting existing in the end of the line" (Buckler, R. Vol. 1, pp. 387-388).

The next question that comes to mind is: Was ammonia present in the aforementioned piping at the time of the explosion? The lower court conceded that there was "ammonia odor at the scene of the catastrophe" (F. F., R. Vol. 1, p. 270). The strength of this odor is indicated by the following statement found in the Coast Guard investigator's report (C. G., R. Vol. 3, pp. 1071-1072):

> "At about 0430 hours, with the vessel heavily ablaze, Chief Fisk of the Tacoma Fire Department and Palmer Paris (2150561) BMC, USCG, OinC of the CG-83527, together with the men from the Fire Department, boarded the vessel in an effort to rescue Weber and also to determine the location of the fire with an eye to effective extinguishment. While they were on board the ship the smell of ammonia became evident, and as the men attempted to enter the superstructure through the starboard amidships door the ammonia became so strong that they were unable to do so. At about this time the ship, which was in the process of settling on the bottom, suddenly listed to starboard, and the men decided that their position was unsafe. They withdrew from the vessel. The ammonia fumes then spread from the ship and became noticeable to people on the dock, particularly in the area near the stern of the vessel * * *"

If the ammonia fumes were this pungent and prevalent thirty minutes after the explosion and after much of the ammonia liquid and vapor had been presumably consumed in a raging fire, one can only conclude that ammonia was present, at the moment of the explosion, in a goodly quantity.

The lower court found that *Pacific Queen's* ammonia system "had previously been completely pumped down" (F. F., R. Vol. 1, p. 271) but there is no evidence to support the use of the word "completely" in this finding. Even Captain Lees, one of Insurers' expert witnesses, admitted "that it is true that even after a system is pumped down and coils are opened for repairs, there is a strong odor of ammonia" (Lees, R. Vol. 3, 871). There was abundant testimony to the effect that "pumping down" does not entirely void the system and that ammonia reaccumulates in the pipes and coils (Buckler, R. Vol. 2, pp. 442, 451).

The presence of abundant ammonia being apparent, what, then, could have exploded it? The evidence is clear that a

fire broke out in the engine room an appreciable amount of time before the explosion. The testimony of Mr. E. L. Smith, Chief Deputy State Fire Marshal for the State of Washington (R. Vol. 2, pp. 459-461), who, because his Chief happens to be the State's Insurance Commissioner, is, for all practical purposes, the Chief Fire Marshal of the State of Washington, is particularly noteworthy. The lower court volunteered at the trial that Mr. Smith was a "man of extended experience" and "whose experience is well known to me" (R. Vol. 2, p. 475). Mr. Smith upon examining the raised hulk of *Pacific Queen,* observed that there was a difference in the depth of char along a line where the engine room forward bulkhead had come up against the hull prior to its having been blown forward into the refrigerator hold. That the char on the engine room side of the old bulkhead line was much deeper and darker than that forward of the line is apparent from photographs, which Mr. Smith analysed for the trial court (Exhs. 41 and 42, R. Vol. 2, pp. 462-463). These photographs will be produced at oral argument at which time they will be further analysed for the benefit of the Appellate Court by Fisheries' counsel.

The char under the bulkhead flange (F. F., R. Vol. 1. p. 271) is explicable. As originally set properly against the hull, according to one of Insurers' experts, the forward engine room bulkhead had between it and the hull a layer of oak caulking material (Spaulding, R. Vol. 2, p. 823). According to Mr. Smith, "it wouldn't take too long for that caulking to burn out, and the charring would be just as severe there as it was on the after side of the bulkhead" (R. Vol. 3, p. 909).

That ammonia will explode or detonate violently is not in dispute. As stated in the N. F. P. A. Handbook of Fire Protection (Heymel, R. Vol. 3, p. 1023; R. Vol. 3, p. 1489):

> "Ammonia gas is not easily ignited, but may be explosive when mixed with air (explosive range 15% to 28%F.). The presence of hydrogen gas, as an im-

> purity in the ammonia, or due to decomposition of the ammonia or lubricating oil used in the equipment adds to the explosive hazard."

Ammonia is currently being used as a rocket fuel (Sax, R. Vol. 2, p. 509) and can detonate (Knisely, R. Vol. 2, p. 678; Moulton, R. Vol. 2, p. 751). Dr. Moulton, one of Insurers' experts, mentioned at the trial that he had direct knowledge of the ammonia explosion which took place "[a]bout eight years ago" on a tuna clipper named the *Comet* which, as a result of the explosion and fire, sank off the coast of South America (R. Vol. 2, p. 747).

How does gasoline stack up as a competing candidate for being the fueler of the *Pacific Queen* blast? There are innumerable factors which rule out gasoline. Before taking these up, seriatim, the lower court's theory that the "peculiar internal system of ventilation and the path of air on the *Pacific Queen* unaided by mechanical ventilation" scooped up remnant vapors in the allegedly gasoline impregnated wooden members in the shaft alley recess, into which gasoline had spilled at Friday Harbor eight days previously, all of which "resulted in the presence in the upper port forward engine room of an explosive mixture of gasoline vapors with air" (F. F., R. Vol. 1, pp. 271-272), must be stated.

Firstly, it must be borne in mind that the "space underneath the first deck and aft of the after engine room bulkhead consisted of an athwartships watertight cofferdam from the after bulkhead of the engine room back to frame 66¾, approximately, and the after bulkhead of the cofferdam extended from the keel to the first deck" (C. G., R. Vol. 3, p. 1056). This watertight cofferdam, which was also considered gasoline tight by one of Insurers' experts (Lees, R. Vol. 3, p. 858), confined the gasoline spilled at Friday Harbor to a compartment entirely separate from the one in which the explosion actually took place.

Secondly, as stated in the N. F. P. A. booklet on fire protection standards for motor craft (Knisely, R. Vol. 2, p. 740) :

> "Gasoline vapors are heavier than air and do not readily escape from low lying pockets such as bilges or tank bottoms."

The explosion was a high level one (C. G., R. Vol. 3, p. 1082). This is disputed by no one. Ammonia fumes, as opposed to gasoline, do not tend to collect, but, rather, are light and tend to dissipate (Sax, R. Vol. 2, p. 508).

Thirdly, even assuming that the gas fumes, if any, in the shaft alley recess, in some manner rose against the law of physics, in order to get into the engine room it would be necessary for them to pass through the watertight door on the centerline of the upper level engine room in the after watertight bulkhead between the engine room and the reefer flat. Was this door open during the night of September 16th/17th? After the explosion it was *found* open—but partly blown off and hanging on one hinge (C. G., R. Vol. 3, p. 1075). The weld around the door frame was ripped from the top center of the door around to the port side of the door and approximately half way down the length of the door. The door opened aft from starboard to port (C. G., R. Vol. 3, p. 1075). Granted, Jasprica testified that the door was "normally kept open", but, when asked if he specifically remembered whether or not the door was left open on the eve of the explosion he replied (R. Vol. 3, p. 1135):

> *"Not to my knowledge, I think* it was open." (Emphasis added.)

The burden of showing it to have been open is upon Insurers and this, we submit, they have not carried.

Fourthly, Mr. John M. Knisely, Insurers' explosion expert at the trial, was asked how much gasoline in liquid form would it have been necessary to have remained in the shaft alley, or anywhere else on the ship, in order that a sufficient detonating mixture would have resulted therefrom to have caused the degree of detonation which actually occurred. He replied (R. Vol. 2, p. 682):

> "The bare minimum figure would be in the neighborhood of two gallons."

The lower court, quantitatively speaking, refers only to gasoline that "must have soaked and impregnated large parts of the wooden area of the ship" (Op., R. Vol. 1, p. 241). Nowhere in the Record is there a scintilla of evidence that any *liquid* gasoline was sloshing around in the bilges of *Pacific Queen* eight days after the spill at Friday Harbor. Additionally, bilges are inherently very damp areas of the ship (Spaulding, R. Vol. 2, p. 842) and it would contravene the laws of physics for gasoline, which floats on water, to sink through this dampness and work its way into soaking wet wood.

A multitude of other factors excluding gasoline as an explosion candidate may be inferred from the facts but, in the interests of brevity, these will be reserved for oral argument. It is noteworthy that the Coast Guard investigator conceded that "the nature of the explosion reflects a point source to some extent inconsistent with an explosion of gasoline vapors permeating the entire engineroom space" (R. Vol. 3, p. 1082).

Neither Moulton (R. Vol. 2, p. 759) nor Lees (R. Vol. 3, p. 874), both experts who testified for Insurers at the trial, were willing to exclude ammonia as a possible explosion candidate. Not only have Insurers utterly failed to point to the source of ignition, as it was their burden to do, but they have also failed to prove with sound principles and logic that the fuel for the explosion was gasoline. Clearly, absent arson, ammonia is the only other available possibility. It is most likely that, in some manner, a fire occurred in *Pacific Queen's* engine room which heated the overhead ammonia lines until one of them burst with the resultant ejection of explosive ammonia vapors into the flaming engine room.

The legal effect of an ammonia explosion will be considered only briefly in latter sections of this brief. It will be seen that it, as would be a gasoline explosion, is a covered peril, especially in view of the fact that no unseaworthiness has been alleged by Insurers in connection with the handling or storage of ammonia on board *Pacific Queen*.

III

The Court erred in failing to conclude that negligence, even of the assureds themselves, will not preclude them from recovery.

As no negligence is claimed with respect to the handling of ammonia, this point accepts, for the purposes of argument, a gasoline explosion, but goes on to show that any negligence in connection with the handling of gasoline will not avail as a defense to the insurance contracts.

The British *Marine Insurance Act,* 1906, 6 Edw. 7, c. 41, set out at length in Appendix 1 of *Arnould on Marine Insurance,* 15th Ed., has codified the English marine insurance law and usage which has been deemed to govern these causes on appeal. Section 55(2)(a) of this act reads as follows:

> "The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew."

The modern law is that a peril of the sea is any fortuitous event, the happening of which results in "damage of a character to which a marine adventure is subject," and that the presence or absence of fault or negligence in the chain of causation is of no consequence. *The Stranna,* (1937) Probate 130. It cannot be denied that the opening of a valve on one of the *Pacific Queen's* gas tanks "in some manner" (Op., R. Vol. 1, p. 239) while the *Pacific Queen* was at Friday Harbor was a fortuitous event, negligently caused or otherwise. In fact, but for such an occurrence, the explosion would not have eventuated upon the facts as found by the court.

In *New York, New Haven and Hartford R. Co.* v. *Gray,* 240 F. 2d 460 (2d Cir. 1957), cert. den. 353 U. S. 966 (1957), the court, in speaking of a marine policy, stated at pages 464-465:

> "Negligence, whether or not 'gross,' but for which the accident would not have occurred, will not serve as a defense to such a policy. Only 'wilful misconduct,' measuring up to 'knavery' or 'design' will suffice; and neither the evidence nor the judge's findings of fact show such conduct. * * *
> And, as this is not a tort action, the horrendous niceties of the doctrine of so-called 'proximate cause,' employed in negligence suits, apply in a limited manner only to insurance policies."

See also: *Frederick Starr Contracting Co.* v. *Aetna Insurance Co.,* 285 F. 2d 106 (2d Cir. 1960). The court, in the *Gray* case quoted above, cited an English case, *Davidson* v. *Burnand,* L. R. 4 C. P. 117, which seems particularly relevant. In this case, which involved a sinking caused by the influx of water through a discharge pipe negligently left open, the court states:

> "The water got in, not by the happening of any ordinary occurrence in the ordinary course of the voyage, but by the accidental circumstances of some cock having been left open by the negligence of the crew. This is, in my opinion, sufficient to make the underwriter liable."

The loss of the *Pacific Queen* would not have occurred, under the facts as found by the trial court, but for the accidental circumstances of a cock having been inadvertently opened and Insurers must be held liable as they were in the *Davidson* case.

We note that the lower court's Findings of Fact, which were drafted in their entirety by counsel for Insurers, refer to "gross negligence and an extraordinary want of due

diligence" on the part of Mardesich, Pacific Queen Fisheries' managing partner, in connection with "hazardous loading, stowage, and subsequent spill of gasoline." "Gross negligence," then, is the strongest epithet leveled at any of the assureds anywhere in the opinions or findings. Such is not sufficient to avoid the insurance. As stated in *Arnould on Marine Insurance,* 15th Ed., § 786:

> "It may be inferred from the language of section 55(2)(a) of the Marine Insurance Act, 1906, although it is not expressly so provided therein, that, even where the peril occasioning the loss has been due to the negligence (not amounting to wilful misconduct) of the assured himself, the underwriter will not, on account of such negligence, be relieved from liability."

It was so decided before the passing of the Act in *Trinder and Co.* v. *Thames and Mersey Marine Insurance Co.,* (1898) 2 Q. B. 114 (C. A.).

Under both English and American law, then, it appears that the assureds may not be precluded from recovering by reason of any negligence that has been found by the court.

IV

The Court erred in failing to conclude that, in any event, the loss of the *Pacific Queen* resulted from perils covered by the "Inchmaree" Clause.

1. The Facts

The opinion of the lower court, in commenting on the Friday Harbor spill, states at page 241, Vol. 1 of the Record:

> "I am fully satisfied that as a result of that spill liquid gasoline and gasoline fumes permeated the lower after portions of that ship, and I am further satisfied that the measures taken to purge it were not adequate in the exercise of due diligence considering the serious nature of the spill."

And further, on page 245:

> "The owners did not use due diligence in that they provided improper and unsafe gasoline discharge facilities for the *Pacific Queen* and in their failure of adequate clean-up and precautions after the Friday Harbor spill."

For the purposes of this argument, we shall assume the correctness of the above views, although, in fact, we do not agree with them.

2. The "Inchmaree" Clause

The Clause reads as follows (R. Vol. 1, p. 82):

> "This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery directly caused by the following: * * *
>
> Explosions on shipboard or elsewhere * * *
>
> Negligence of Master, Mariners, Engineers or Pilots. provided such loss or damage has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers.
>
> Masters, Mates, Engineers, Pilot or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel."

The "Inchmaree" clause appears, with slight variations, in every form of Hull Clauses in present-day use, and its introduction into general use has greatly extended the liabilities of the underwriter. *Templeman on Marine Insurance,* page 316. Its genesis was commented on in *Saskatchewan Government Ins. Office* v. *Spot Pack,* 242 F. 2d 385 (5th Cir. 1957) at page 391 as follows:

> "Finally, the Underwriter, seeking to shore up its claim of a running, continuing obligation to use due

> diligence to keep the vessel seaworthy and unable to find words remotely suggesting 'due diligence' elsewhere in the policy, insists that the Inchmaree Clause expressly states it. But this is to read that Clause as a restriction of coverage and to ignore its rich history which reveals it and its several expansive amendments as the underwriters' response to the practical business needs of the shipping world in the face of adverse court decisions. As such, its purpose is to broaden, not restrict, to expand, not withdraw, coverage."

(A footnote to the above quotation refers to abundant historical sources.)

3. Negligence in purging the *Pacific Queen* of the effects of the spill is covered by the clause.

When the lower court states in its opinion (R. Vol. 1, p. 241) that "the measures taken to purge 'the *Queen*' were not adequate in the exercise of due diligence" it is, in effect, spelling out negligence. "Negligence," however, is explicitly covered by the clause "provided such loss has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers." Who, then, among the owners, participated in the purging of the vessel?

The lower court points out (R. Vol. 1, p. 240) that August Mardesich was on the *Pacific Queen* the day of the spill. True, but he arrived after the officers and crew had finished cleaning up and the vessel was back in operation discharging her cargo of fish (Jasprica, F. Vol. 4, pp. 1553, 1582). It must be determined, in the first instance, how extensive was his obligation to use due diligence to keep the vessel seaworthy under the circumstances surrounding the spill. The English law is that if it were shown that an owner had reason to believe that his ship was in fact unseaworthy, and *deliberately* refrained from an examination which would have turned his belief into knowledge, he might properly be held privy to the unseaworthiness

of his ship; the mere omission to take precautions against the possibility of the ship being unseaworthy cannot make the owner privy to any unseaworthiness which such precaution might have disclosed. *Cia Naviera Vascongada* v. *British & Foreign Marine Insurance Co., Ltd.,* (1936) Ll. L. Rep. 35, 58.

The evidence in this case does not show that Mardesich believed that gasoline had "soaked and impregnated large parts of the wooden area of the ship" (Op., R. Vol. 1, p. 241) and that he *deliberately* refrained from further examination. On the contrary, he was satisfied that the bailing, hosing and blowing efforts were sufficient to purge the *Pacific Queen,* and, under the applicable law, due diligence is thereby spelled out. It was solely the job of the *Pacific Queen's* "Master, Mariners and Engineers" to see to the *details* of purging the ship. As stated in the *Spot Pack* case, 242 F. 2d 385, 390 (5th Cir. 1957),

> "* * * if Courts succumb to the beguiling paternalistic plea that someway, somehow, the Owner ought to have checked to see if a duty was fulfilled, responsibility, thus divided, is undermined."

Jasprica is specifically excluded as an owner within the meaning of the "Inchmaree" Clause by the following language:

> "Masters, Mates, Engineers, Pilot or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel."

As stated in the *Spot Pack* case, cited supra, at page 392, it is unsound to "attempt to carve up the person of Master, or Engineer, or crew member into a metaphysical duality." The *Spot Pack* decision has been followed in its interpretation of the "Inchmaree" Clause in *Tropical Marine Prod.* v. *Birmingham Fire Ins. Co. of Pa.,* 247 F. 2d 116 (5th Cir. 1957), cert. den. 355 U. S. 903 (1957).

4. Explosion is covered by the clause.

"Explosions on shipboard or elsewhere" are specifically covered under the "Inchmaree" Clause. The Court has found (Op. R. Vol. 1, p. 243) that the destruction of the *Pacific Queen* was "the result of a gasoline explosion." What has been said above as to "due diligence" of the owners and the manager applies equally to the sub-section of the "Inchmaree" Clause specifying coverage for explosions, whether gasoline fueled, or ammonia fueled.

V

The Court erred in failing to conclude that the assureds were under no obligation to disclose any circumstances presumably known to Insurers or waived by them.

1. It must be conclusively presumed that Insurers knew the *Pacific Queen*'s methods of gasoline storage and handling.

Section 18 of the *Marine Insurance Act* reads, in part, as follows:

> "(3) In the absence of inquiry the following circumstances need not be disclosed, namely:
>
> (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such, ought to know."

"The assured", said Lord Mansfield, "need not mention what the underwriter knows, what way soever he came by the knowledge; *or what he ought to know*; or takes upon himself the knowledge of; or waives being informed of; or what lessens the risk agreed and understood to run; or general topics of speculation; or every cause which may occasion natural perils, as the difficulty of the voyage, kind of seasons, proba-

bility of hurricanes, earthquakes, etc.; or every cause which may occasion political perils, from the rupture of states; from war, and the various operations of it, upon the probability of safety, from the continuance and return of peace, or from the imbecility of the enemy." *Carter* v. *Boehm,* (1766) 3 Burr. 1909; *Arnould on Marine Insurance,* 15th Ed. § 621. (Emphasis added.)

That the presumption referred to in the *Marine Insurance Act* is rooted deep in the mercantile past is indicated by the statement made by Lord Mansfield in *Noble* v. *Kennoway,* (1708) 2 Doug. 510, that:

> "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is established, or not. If he does not know it, he ought to inform himself."

See also: *Grant* v. *Lexington Ins. Co.,* 5 Ind. 23, 61 Am Dec. 74 (1854).

A lucid discussion of the above principle may be found in *Hazard* v. *New England Marine Ins. Co.,* 8 Pet. 557, 8 L. Ed. 1043, 33 U. S. 557 (1834). At page 1052 of 8 L. Ed. the Court quoted from a decision in 4 Mason 439 as follows:

> "Where a policy is underwritten upon a foreign vessel, belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in such country as to the *equipments of vessels* of that class for the voyage on which she is destined. * * * Men who engage in this business are seldom ignorant of the risks they incur; and it is their interest to make themselves acquainted with the usages of the different ports of their own country and also those of foreign countries. This knowledge is essentially connected with their ordinary business and by acting on the presumption that they possess it, no violence or injustice is done to their interests." (8 L. Ed. 1052). (Emphasis added.)

Hence, where the insurer asks for no information and the insured makes no representations " * * * it must be presumed that the insurer has in person or by agent in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him." *Clark* v. *Manufacturers Ins. Co.,* 8 How. 235, 12 L. Ed. 1061, 1066-1067.

The presumption involved is not rebuttable but conclusive, as is illustrated by the *Clark* case. It was there held that the underwriters, when not requiring representations from the insured, must "in point of law" be deemed to insure at their own peril (12 L. Ed. 1067).

Prior to issuance of insurance coverage for *Pacific Queen* for the season of 1955, Insurers required their usual condition survey of the vessel. The report, dated May 13, 1955, was prepared by a Mr. Marquat of the United States Salvage Association and ran some five typewritten pages (Lees, R. Vol. 2, p. 630). (The United States Salvage Association "is a service organization of marine surveyors for the express purpose of providing information to Underwriters concerning vessels, docks, piers, tugs, barges, anything of a marine nature" (Lees, R. Vol. 2, p. 635)). The survey form employed by Marquat stated, in bold print (Exh. 16):

"THIS REPORT IS EXCLUSIVELY FOR THE USE AND INFORMATION OF UNDERWRITERS".

On page 4 of the survey the following entries are found under "Fuel and Water Capacities":

"Fuel 49,000 gallons
Water 14,000 "
Gas 3,000 "

(Gasoline tanks under deck aft, proper filling lines and vents to atmosphere)."

On page 5 of the survey report, the last entry reads:

> "Ten 30-foot power seine skiffs are nested and lashed to the upper deck of this vessel."

The next year, 1956, *Pacific Queen* did not engage in Alaska operations, but remained in lay-up status (F. F., R. Vol. 1, p. 258). About May 2, 1957, Hansen & Rowland, Fisheries' insurance brokers, requested United States Salvage Association to make a condition survey of *Pacific Queen* (F. F., R. Vol. 1, p. 258). Insurers required such a survey as a condition precedent to the provision of insurance coverage (Duren, R. Vol. 4, p. 1444). The surveyor sent over by the Salvage Association was Mr. J. E. Elkins who had surveyed the vessel once before in 1949, at which time no gasoline was being carried by the vessel (F. F., R. Vol. 1, p. 258). Mr. Elkins, through past experience, was thoroughly acquainted with Bristol Bay gillnetter operations (Elkins, R. Vol. 3, pp. 1201, 1209, 1210, 1211) and admitted that he had seen gasoline storage on other reefer vessels in the Northwest (R. Vol. 3, p. 1217).

The deposition of Elkins, taken at the instance of plaintiffs, is set out in full in Volume 3 of the Record, pages 1171-1225, as he is considered to be one of the more important witnesses whom the trial judge did not have the opportunity to scrutinize. Owing to the fact that Elkins was a California resident, plaintiffs were unable to produce him at the trial (R. Vol. 4, p. 1603). Some of the most significant portions of his deposition testimony with respect to his survey of *Pacific Queen* are as follows (R. Vol. 3, pp. 1184, 1186, 1188, 1193, 1196):

> "Q. Now when you met Mr. Jasprica, [the Chief Engineer], did you recognize him? Did you know who he was? A. No.

Q. Did you talk to him? A. Not about the vessel, as I recall. I think we talked more about the previous fishing season, and—

Q. Well, did you ask him who he was? A. No, sir.

Q. Did you ask for help? A. No, sir.

Q. Did you ask him to accompany you? A. No, sir.

Q. Did you ask him where the chief engineer was? A. No, sir.

Q. Did you ask him where the master was? A. No, sir.

* * *

Q. Did you ask him to get any help for you that you wanted? A. No.

Q. Did you ask him to put any light on the ship? A. No.

* * *

Q. And you were supposed to have somebody with you? A. According to our rules, yes.

Q. Did you obey your rules? A. No.

* * *

Q. Were you ever denied access to any area of the vessel that you wished to look at? A. No.

* * *

Q. Did you ask to see where the gasoline was stored? A. No.

* * *

Q. And you were never refused any information on the vessel, were you? A. Not in this particular case."

Before leaving the ship, Elkins "looked over the piping" connected with the "auxiliary tanks aft" with his flashlight (Elkins, R. Vol. 3, p. 1206) and, apparently, "dropped by" *Pacific Queen* on a subsequent afternoon to see if they had filled up the CO_2 bottles (Elkins, R. Vol. 3, p. 1188).

Elkins survey report (Lees, R. Vol. 2, pp. 631-632) included the following remarks:

> "THIS REPORT IS EXCLUSIVELY FOR THE USE AND INFORMATION OF UNDERWRITERS".
>
> * * *
>
> This vessel acts as mother ship to 12 power gillnet boats.
>
> * * *
>
> Gillnet boats approximately 30′ x 8′ powered with 4-cylinder gasoline engine. Considerable damage around guards and open seams in hull. Owner has crew of men repairing gillnet boats and same will be in good operating condition before departure for Bristol Bay.
>
> * * *
>
> Vessel has been inspected while afloat at Tacoma, Washington and upon compliance with above recommendations, will be in satisfactory condition for operation."

Mr. Galbreath, a vice-president of Marine Office of America which was, and may still be, the marine manager for Glenns Falls Insurance Company, one of the Insurers, made several illuminating remarks at the trial. First, he acknowledged that it was "customary" for each Underwriter to pay a proportion of the survey fee for a survey of a vessel on which Underwriters "subsequently take a line" (R. Vol. 2, p. 777). Secondly, he admitted that (R. Vol. 2, p. 780):

> "We knew if she had—were using these tanks that had been mentioned in previous surveys for gasoline carrying—the purpose of putting the gasoline in those tanks was to fuel her own gillnet vessels."

Thirdly, he acknowledged that the committee of the Pacific Coast Hull Association, some members of which had had prior experience with *Pacific Queen,* was "satisfied with the vessel and gave it a rating" in May of 1957 (R. Vol. 2, p. 788).

Fourthly, he further acknowledged that Mr. Duren, of Hansen & Rowland, the assured's insurance brokers, who approached him with the object of placing the risk, "did not decline to answer any" of Mr. Galbreath's questions concerning the vessel; nor had Mr. Galbreath ever received a "false answer" from Mr. Duren (R. Vol. 2, pp. 789-790). Lastly, he stated that Marine Office of America had "complete confidence" in the surveys issued by the Salvage Association and its predecessor, the Board of Marine Underwriters (R. Vol. 2, p. 779).

Insurers must be presumed to know what their agents know, and, in the case of surveyor's, they must be presumed to know what their surveyors ought to learn through a reasonable degree of alertness and duly diligent inquiry. If the survey is negligently made, as Insurers now contend the Elkins survey was, it would be grossly unfair to impose the penalty for this negligence upon the assureds who had no reason to suspect that the surveyor would not properly perform his job.

2. Insurers waived disclosure of the *Pacific Queen*'s methods of gasoline storage and handling.

Section 18 of the *Marine Insurance Act* contains another exception which is applicable to this case. This section reads, in part:

> "* * * (3) In the absence of inquiry the following circumstances need not be disclosed, namely: * * *
>
> (c) Any circumstance as to which information is waived by the insurer."

The above sub-section was given extensive consideration in *Mann, MacNeal and Steeves* v. *Capital and Counties Insurance Co.,* (1921) 2 K. B. 300. This case involved a wooden, gas screw motor schooner which exploded and was totally

lost. Underwriters declined payment under the policies involved, pleading that the policies were voidable by reason of non-disclosure of an engagement to carry 2,500 drums of gasoline. The Court, in holding that the policies were valid because the underwriters had waived disclosure of the engagement by abstaining from inquiry, stated in part:

> "The engines of such a vessel are run with fuel oil and a considerable quantity of petrol is carried in tanks in the engine room for the purpose of heating the hot bulb of the engines, and for working the small petrol engines, which drive the winches. The quantity of petrol so carried by this vessel would probably be from 300 to 400 gallons. * * * I think that the plea of waiver can be supported on the ground indicated by Lord Esher, M. R. in *Asfar & Co.* v. *Blundell,* (1896) 1 Q. B. 123, 129, where in dealing with the question of concealment he says: 'But it is not necessary to disclose minutely every material fact; assuming that there is a material fact which he'—the assured—'is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information they ought to ask for it.' In my opinion the disclosure in the present case that this vessel was a wooden vessel with auxillary motor engines was a disclosure of the fact that it was proposed to carry cargo from the United States to France in a vessel specially and dangerously liable to fire damage, and that such disclosure was, within Lord Esher's language, a sufficient disclosure to put the underwriter on inquiry. Having regard to the language of the material section of the Marine Insurance Act, 1906, in which the law relating to concealment is now contained, the conclusion is rather that disclosure had been waived than that it had not been made; but the result is the same, so far as the appellants' case is concerned." (Per Bankes, L. J., pp. 306-309) * * *

"The learned Judge [below] has found that the freight engagement was a material circumstance, within the definition in sub-s. 2, for he thinks that it would have influenced the mind of a prudent insurer both in fixing the premium and in determining whether he would take the risk. I am not sure that I should have come to the same conclusion, in view of the fact that this small wooden cargo vessel possessed auxillary internal combustion engines and therefore had to carry in the engine-room a store both of crude oil and petrol, facts which were known to the insurers and would seem to indicate more peril than the cargo in question. * * * [The underwriter] is presumed to know matters of common knowledge and matters which an insurer in the ordinary course of his business as such ought to know. Amongst such matters would be, in the present case, that the vessel insured was a cargo vessel, that she would be carrying cargo from the United States of America to France, and that the cargo might consist of petrol in drums. If he objects to insuring such a cargo he can protect himself by making an inquiry or by insisting on a warranty against such cargo." (Per Atkin, L. J., pp. 310-312) * * *

"I do not conceive that the conclusions reached both by my Lord and Atkin L. J. on this question of waiver have the effect of weakening the governing statutory principle that a contract of Marine insurance is a contract based upon the utmost good faith. I do not doubt that the Courts must be at all times instant [insistent?] to see that this essential principle is never impinged upon. The views now expressed are, however, called for not only by the practice but by the necessities of marine insurance business as now conducted; they do little more than extend to voyage policies principles which must ex necessitate rei obtain in connection with time policies, and they are so

> far justified not only by the absence from the books of any decision to the contrary of them, but by the existence in America, if we may judge from the passage from Duer cited by Mr. Mackinnon, Vol. ii. Lect 13, s. 41, p. 446, of an absolute rule there to the same effect. Nor as it seems to me, is the principle adopted in these judgments, while necessary for the due conduct of business, injurious to any interest that requires protection even under these contracts uberrimae fidei. Every nervous or sceptical underwriter can always protect himself by a clause of warranty or by inquiry; and if there be on the part of the insuring broker, even in such a matter as we are here dealing with, any fraudulent concealment, the underwriter will of course be relieved unless the fraudulent broker discharges the very heavy burden of establishing affirmatively that the fraud which he perpetrated for the purpose of influencing the underwriter's judgment was in fact, in no way effective to lead him to accept the risk on the terms agreed." (Per Younger, L. J., pp. 317-318.)

The Marquat and Elkins surveys, fully discussed under sub-topic 1 above, without any doubt effected disclosure and imparted knowledge sufficient to call Insurers' attention to the fact that there was gasoline carried on board. If Insurers failed to have the gasoline storage facilities on board adequately inspected, they must be deemed to have waived any objections to the manner of storage and the supplying of detailed information concerning such storage.

Elkins' survey being favorable, the contract of insurance was complete. The assureds so understood, and, in reliance thereon, embarked upon their voyage. Insurers should be estopped, then, from asserting concealment as a defense. At the least, it is apparent that they have waived this defense by not causing a diligent and timely inspection to be made of the gasoline storage facilities on board *Pacific Queen*.

VI

The Court erred in failing to conclude that the insurance is not avoided because of unseaworthiness.

1. The Facts

The Court has found that the *Pacific Queen* was "rendered unseaworthy by changes in structure in carrying * * * gasoline during or before the year 1957 and by the gas spill at Friday Harbor, and plaintiffs' failure subsequent thereto to properly free the vessel of gasoline and gasoline fumes or to take proper precautions to prevent its recurrence" (Op., R. Vol. 1, p. 238). As pointed out under our Point V, either Insurers must be presumed to have known of any "unseaworthiness" existing prior to the Friday Harbor spill or it must be considered that they have waived the disclosure of information concerning it. The legal effect of the Friday Harbor spill, if any, will be taken up below.

2. There is no implied warranty of seaworthiness in this case.

Section 39(5) of the *Marine Insurance Act* states:

> "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure * * *"

As plaintiffs are suing under time policies, the above wording knocks out any implied warranty of seaworthiness unless defendants can bring themselves within the special exception found in the latter part of the section which reads:

> "but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

3. The assureds did not send the *Pacific Queen* to sea after the Friday Harbor spill.

The *Pacific Queen* was never "sent to sea" after the Friday Harbor spill. All her maneuvers subsequent to the spill and up until the time of the explosion at Tacoma were in inland waters, more specifically, Puget Sound (R. Vol. 3, pp. 1167-1170). Section 82.1 of the U. S. Coast Guard "Pilot Rules for Inland Waters" states:

> "[T]he regulations in this part are prescribed to establish the lines dividing the high seas from rivers, harbors, and inland waters in accordance with the intent of the statute and to obtain its correct and uniform administration. The waters inshore of the lines described in this part are 'inland waters,' and upon them the Inland Rules and Pilot Rules made in pursuance thereof apply."

Section 82.120 of these regulations establishes the boundary line between the high seas and inland waters in the Juan de Fuca Strait and Puget Sound area as follows:

> "A line drawn from the northernmost point of Angeles Point to Hein Bank Lighted Bell Buoy; thence to Lime Kiln Light; thence to Kellett Bluff Light; thence to Turn Point Light on Stuart Island; thence to westernmost extremity of Skipjack Island; thence to Patos Island Light; thence to Point Roberts Light."

All of the *Pacific Queen's* movements subsequent to the Friday Harbor spill, as her log reflects, were well to the inshore side of the demarcation line specified in the Coast Guard regulations (R. Vol. 3, pp. 1167-1170).

It is submitted that the expression "sent to sea," as used in the *Marine Insurance Act,* was intended to mean something akin to "embarked on her adventure." It is at this time that Insurers have an interest to inquire into seaworthiness of the vessel to be insured before putting themselves at risk. Once the risk is accepted, with sufficient opportunity

to ascertain the facts having been afforded, the risk should remain attached, barring any personal misconduct of the owners or a loss resulting from their willful act or default.

The *Pacific Queen* was not commencing her adventure upon getting under way at Friday Harbor. Her adventure had been salmon fishing off the Alaskan coast, and that adventure had been terminated by the time of the Friday Harbor spill. Her last maneuvers were merely precedent to going into lay-up, as is well evidenced by the lay-up warranty extension under Endorsement Number 2 on the certificates (R. Vol. 1, p. 85).

In *New York N. H. and H. R. Co.* v. *Gray,* 240 F. 2d 460 (2nd Cir. 1957), cert. den. 353 U. S. 966 (1957), the Court rejected underwriters' defense that the ship had been put to sea in an unseaworthy state with the privity of the assured, pointing out, at page 466, that *"when the accident happened,* the carfloat had not been 'sent to sea' but was still moored" (emphasis added). The *Pacific Queen* was also tied up at the time of her accident and, therefore, underwriters' defense under Section 39 (5) of the *Marine Insurance Act* should be rejected in this case as it was in the *Gray* case.

The West Kebar, 4 F. Supp. 515 (D. C. N. Y. 1933), also supports plaintiffs' position. The pertinent language of the Court is as follows:

> "The movement of the West Kebar from one berth to another in the same harbor did not constitute the commencement of the voyage" (p. 519).

It is submitted that it is hardly one step further to say: The movement of the *Pacific Queen* from one berth to another in the same Sound did not constitute being "sent to sea."

4. Mere omission to take precautions against the ship being unseaworthy does not make the owner privy to any unseaworthiness which such precautions might have disclosed.

For the purpose of the following discussion, it will be assumed that the *Pacific Queen* was "sent to sea" after the Friday Harbor spill even though this is clearly not the fact.

The lower court states in its opinion (R. Vol. 1, p. 239):

> "The vessel was unseaworthy after the Friday Harbor spill for want of full and proper precautions to clean and purge the ship after that spill."

Insurers' defense of unseaworthiness fails, however, unless they can establish that the *Pacific Queen* was sent to sea after the Friday Harbor spill in an unseaworthy state *with the privity* of the assured. *Marine Insurance Act,* 1906, § 39 (5). What, then, is meant by the term "privity" and upon whom rests the burden of establishing such "privity"?

Cia. Naviera Vascongada v. *British & Foreign Marine Insurance Co., Ltd.,* (1936) 54 Ll. L. Rep. 35, involved the loss of a Spanish vessel, the *Gloria,* following heavy weather in the Irish Sea. Plaintiffs claimed for the loss under a time policy but defendants denied liability, contending that the vessel was scuttled, and alternatively, that she put to sea in an unseaworthy condition with the privity of the owners. The Court, in deciding for plaintiffs, stated at pages 51-58:

> "With regard to unseaworthiness, on the other hand, the onus is upon the defendants to show that the vessel was unseaworthy when she left Larne—which was her last port—and that the plaintiffs were privy to the fact that she was unseaworthy then (p. 51). * * * This brings me to the last point taken on behalf of the underwriters. I have held that the *Gloria* was unseaworthy when she left Larne. Were the plaintiffs privy to her so doing? To prove that they were the

> defendants must establish privity in someone in authority in the plaintiff company. * * * The Marine Insurance Act, 1906, contains no definition of the expression 'with the privity of the assured', which is used in Sect. 39 (5), the subsection upon which the defendants must rely. Nor has its exact meaning been argued or defined in any decided case. It is contended by Mr. Willink for the plaintiffs, that actual knowledge of the unseaworthiness to which the loss is attributable, must be proved. For this he relies upon the *dictum* of Lord Birkenhead in Mountain v. Whittle, (1921) 1 A. C. 615, at p. 618, and of Mr. Justice Roche, as he then was, in Frangos and Others v. Sun Insurance Office, 49 Ll. L. Rep. 354, at p. 357, and upon the definition of 'privy' in the Oxford Dictionary: 'participating in knowledge—accessory.' Mr. Willink also referred to Dudgeon v. Pembroke, 2 App. Cas. 284, at p. 297, but that was a case decided before the Act which I have to construe, and so I prefer to leave it out of consideration (pp. 57-58). * * * I think that if it were shown that an owner had reason to believe that his ship was in fact unseaworthy, and *deliberately* refrained from an examination which would have turned his belief into knowledge, he might properly be held privy to the unseaworthiness of his ship. *But the mere omission to take precautions against the possibility of the ship being unseaworthy cannot, I think, make the owner privy to any unseaworthiness which such precautions might have disclosed"* (p. 58). (Emphasis added.)

We have, then, a succinctly stated measure of the word "privity" as used in the *Marine Insurance Act.* It is not the role of this Court to disagree with it as English law and usage have been found to govern the contracting parties. It is, then, the role of the Court to apply the above standard of privity to the facts as it finds them. In doing so, we

submit that a finding that Mardesich and Jasprica *deliberately* refrained from an examination which might have revealed that gasoline "must have soaked and impregnated large parts of the wooden area of the ship" would be clearly erroneous (Op., R. Vol. 1, p. 241). Additionally, the omission to take precautions beyond washing down the affected areas and the employment of blowers and a bilge solvent cannot make the owners privy to any unseaworthiness which any additional precaution might have disclosed.

Before leaving this point, we would like to call special attention to number 24 of our Statement of Points in Volume 1 of the Record at page 297d. This point reads:

> "24. The Court erred in not applying much of the English law cited in the briefs after it had made the determination that English law and usage was to be controlling. In particular, the Court entirely overlooked a key English case, Cia. Naviera Vascongada v. British & Foreign Marine Insurance Co., Ltd. (1936) Ll. L. Rep. 35 and nowhere mentioned it by name or import in its opinions."

VII

The Court erred in failing to conclude that there was no violation of the Tanker Act.

Even if the Tanker Act, 46 U. S. C. § 391a, is applicable to fishing vessels, which the Coast Guard Commandant says it is not (R. Vol. 3, pp. 1092-1093), interpretation of the exception in the act, "fuel or stores", must be broad enough to fairly include the use of gasoline in gillnetters supplying fish to the *Pacific Queen* or the other reefer vessels associated with her in a Joint Venture (R. Vol. 3, pp. 1229-1234).

A narrow construction, however, reaching a contrary conclusion does not spell out such "a want of due care and diligence" (Op. R. Vol. 1, pp. 293-294) presumably as to make the vessel unseaworthy.

The District Court found:

(a) That the Tanker Act was applicable (Op., Vol. 1, p. 247).

(b) That gasoline was supplied to gillnet boats belonging to other freezers like herself under a Joint Venture Agreement and to two independent fishermen as well, and

(c) That the gasoline transported by the *Pacific Queen* to be used as described in (b) above was not "fuel or stores" but "cargo" transported in violation of the Tanker Act (F. F., Vol. 1, pp. 275-276).

On this general subject, the Court found that such violation of the Tanker Act constituted negligence or want of due care and diligence on the part of the vessel's owners but that this violation was not of such a character as to render the entire venture or voyage an illegal one. The Court found that the hauling of the gasoline in bulk for the use described above was not the primary purpose of the voyage but merely an incident thereof (Op., Vol. 1, pp. 293-294; C. L., Vol. 1, pp. 284-285).

How "a lack of due care and diligence," presumably to make a vessel seaworthy but not so stated, can be spelled out from a use of gasoline in gillnetters other than her own but associated with her, we do not know and submit that this is an altogether improper conclusion, even assuming the correctness of the basis on which it is made.

Appellants here do not dispute the applicability of the Tanker Act if, and only if, bulk gasoline is carried for use other than "fuel or stores." In a broad sense, and, we submit, a fair one, this was not the case.

There is nowhere a single finding in the record that any of the gasoline carried by the *Pacific Queen* was used for any purpose other than in furtherance of her fishing venture, whether such venture be considered joint with others or not. Pacific Queen Fisheries' and Pacific Reefer Fisheries' joint

venture agreement of May 10, 1957 (R. Vol. 3, pp. 1229-1234) was merely a practical and legitimate response to conservation restrictions imposed by the U. S. Fish and Wild Life Service (Mardesich, Vol. 3, pp. 986-987). This agreement merely constituted an effort by fishermen to stay in business and continue in their ancient trade by all proper means. It was well known, and there is no dispute in the record (Stephan, Vol. 3, p. 1257), that some of the owners of the *Pacific Queen* were likewise the owners of the other three vesesls of the same class, in the same trade with whom the *Pacific Queen* had her Joint Venture Agreements. There are a few independent Alaskan fishermen who own their own gillnet boats and during the season supply themselves with the only cash income available to them by fishing for various reefer vessels working those waters during the relatively short season. Two of them fished for the *Pacific Queen*. For this purpose they required to be supplied with gasoline fuel without which they could not operate. This sort of operation and accommodation is encouraged by all departments of the Government in order to assist Alaska in obtaining some sort of balanced economy.

Nowhere in the Record is there any suggestion that any of the gasoline carried by the *Pacific Queen* was used for any purpose other than that above referred to. We submit that in a larger, but nevertheless fair sense, all the gasoline she carried was used as "fuel or stores". Not a drop was ever used for any purpose other than operating gillnet boats that either directly or indirectly contributed to the fishing income of the *Pacific Queen* and those who manned her. No gasoline was ever sold or used ashore or afloat for other purposes. Had this been true, such gasoline would have indeed been "cargo" and rendered this vessel subject to Coast Guard inspection under the Tanker Act. When the District Court found, in its conclusion on the subject, that the carrying of gasoline in bulk was only an incident to the voyage and not its primary purpose, it came to the same conclusion, by inference, that we have expressed above.

In conclusion, we believe that the decision reached by the Commandant of the Government agency charged with the writing and enforcement of regulations under the Tanker Act should be given some weight. The Commandant of the Coast Guard, Vice Admiral A. C. Richmond, in his final disposition of this matter came to the following conclusion:

> "3. Since full compliance with either the regulations under the Tanker Act or the Dangerous Cargo Act, neither of which regulations were designed to cover this type of vessel and operation, which is presumably fishing, is impossible, or impracticable of accomplishment and further, since it is possible that the legal responsibilities of the owners of this type of vessel are not sufficiently clear, the file in this case will be referred to the Merchant Marine Council for study and action towards issuing such clarifying regulations as may be indicated" (R. Vol. 3, p. 1093).

Perhaps this final conclusion was a very practical one. The other reefer vessels, except one which was later lost by stranding, are all operating today, carrying gasoline in bulk for the operation of gillnetters in Alaskan waters, and all are insured by virtually the same underwriters in the same market that insured the *Pacific Queen.*

VIII

The Court erred in concluding that Hull, Peck and Royer were partners in Pacific Queen Fisheries.

The Certificate of Assumed Name (R. Vol. 1, pp. 15-17), duly filed on November 9, 1959 lists only the following as being partners:

> August P. Mardesich, Mike Barovic, Donald Barovic, John B. Breskovich, Nick Jasprica, J. J. Petrich, Joseph Mardesich, Nick Mardesich, Jr., John K. Villicich, Nick Ursich, Madeline Ursich, Louis Ursich.

The Certificate states that John B. Breskovitch had at some time entered into a separate agreement with Hull, Peck and Royer, pertaining to his interest in the partnership, whereunder they may have acquired "some interest" in the portion owned by Breskovitch.

Subsequently, by judicial fiat, Hull, Peck and Royer were deemed "additional plaintiffs" to these causes (R. Vol. 1, pp. 21, 51). The original plaintiffs do not dispute that, in order to maintain an action upon a partnership asset, the partners must be joined as parties to the action. *Seltzer* v. *Chadwick,* 26 Wash. 2d 297, 173 P. 2d 991 (1946). It is their contention, however, that the arrangement between Breskovitch and the three men did not constitute them partners.

United States v. *Coson,* 286 F. 2d 453 (9th Cir. 1961), a recent decision of this Appellate Court, seems to have decided the matter. It was therein stated, at page 462 that:

> "The transfer by a partner of his partnership interest does not make the assignee of such interest a partner in the firm. Hazen v. Warwick, 256 Mass. 302, 152 N. E. 342; Johnston v. Ellis, 49 Idaho 1, 285 P. 1015; Bynum v. Frisby, 73 Nev. 145, 311 P. 2d 972."

As we know of no damaging "admissions" made by any of these three men as referred to in the lower court's Findings of Fact X (R. Vol. 1, p. 286), we do not consider that this point warrants further discussion.

IX

The Court erred in concluding that the assureds' suit against Buffalo Insurance Company is time barred.

1. The Buffalo policy never became operative.

The one year contractual time bar provision contained in the Buffalo policy is set out in the lower court's Conclusions of Law at page 286, Vol. 1 of the Record, and the policy, or what more accurately should be termed a form, may be viewed at page 69. In its own words, the form states that "this policy shall not be valid unless countersigned by the duly authorized Agents of this Company." As may be readily seen, it was not countersigned and is, therefore, of no effect.

2. The terms of the insurance contract effected with Buffalo Insurance Company are embodied in the certificates of insurance issued by Hansen & Rowland, Inc.

The certificates involved state on their face in bold print (R. Vol. 1, p. 76):

> **"Certificate of Insurance Issued by Hansen & Rowland, Inc.**
>
> **Who have procured insurance as *hereinafter specified* from * * * Buffalo Insurance Company." (Emphasis added.)**

Attached to the face page of the certificates are the numerous terms, conditions and clauses which were intended to comprise the entire policy. The certificate represents that the insurance "procured" from Buffalo Insurance Company was as "specified" in the attached terms, conditions, and clauses. There is no intimation that a contractual limitation of action formed any part of the insurance procured. The meeting of the minds was limited, then, only to the terms contained in the certificates and the attachments thereto.

The meeting of minds was further delimited by the following verbiage found on the face of the certificates:

> "This insurance is made and accepted subject to all the provisions, conditions and warranties set forth in this face page and in the wordings, forms, and endorsements attached hereto, *all of which are to be considered as incorporated herein,* and any provisions or conditions appearing in the wordings, forms or endorsements *attached hereto* which alter the provisions and conditions appearing on this face page shall supercede such last mentioned provisions or conditions insofar as they are inconsistent therewith." (Emphasis added.)

The Buffalo form is skeletal in comparison with the coverage which had been effected under the certificates. It did not, for instance, contain the specific clauses—such as the American Hulls (Pacific) and the California Fishing Vessels endorsement—which framed the coverage which plaintiffs needed and sought and which comprised the only terms and conditions upon which there had been a meeting of the minds. Plaintiffs, herein, contemplated buying the comprehensive coverage afforded under the certificates, not the bare coverage of the Buffalo form which the defendant seeks to utilize as a trap for the unapprised and the unknowing.

In considering a similar one year contractual time bar provision, Viscount Dunedin, in *Phoenix Ins. Co. of Hartford* v. *De Monchy,* (1929) 45 T. L. R. 543, 35 Com. Cas. 67, 74 stated:

> "It follows, I think, that all clauses of the policy which are essential to the contract of marine insurance must be read into the certificate, but beyond that there is no necessity to go. The condition in question is a collateral stipulation imposing a condition precedent. It has nothing particular to do with insurance, but might be applied to any contract. Common sense and fairness revolt against the idea of this being enforced against the holder or indorsee of the certificate."

A contractual time bar forms no part of the terms of the only contracts that were consensually consummated—the certificates and their attachments. The policy provision providing for such a bar being in derogation of the general statute of limitation, the Court should give plaintiffs every favorable inference in deciding this point.

X

The Court erred in denying assureds' motion for jury trial.

When *Pacific Queen Fisheries* v. *Symes* and the English underwriters was removed from the State to the Federal Court by the consent of both counsel and both judges, a demand for a trial by jury had already been made, perfected and the jury fee paid in accordance with the Rules of Practice of the Superior Court of the State of Washington (R. Vol. 1, p. 53). Under F. R. C. P. 81(c) the party who has made a timely demand in State Court retains it in the District Court.

When this case was removed and subsequently consolidated (R. Vol. 1, p. 223) with *Pacific Queen Fisheries* v. *Atlas* and other American companies, then pending in the District Court, plaintiffs still retained their right to a trial by jury in the consolidated cause and it did not lie within the discretion of the District Court to take from them a Constitutional right which they had already perfected and never waived.

Pacific Queen Fisheries v. *Symes* and the other English underwriters was commenced on September 29, 1958, removed to the District Court and remanded to Superior Court where a Second Amended Complaint was filed on November 10, 1959 (R. Vol. 1, pp. 3-9). This case was later No. 2348 in the District Court. To this Complaint defendants demurred and the demurrer was overruled (R. Vol. 1, p. 20) by the Judge of the Superior Court, Pierce County, on May 9, 1960. Plaintiffs moved to strike much of defendants subsequent answer on June 12, 1960, which motion was filed June 17, 1960 (R. Vol. 1, pp. 38-46).

Defendants state (R. Vol. 1, p. 51) that on July 22, 1960, they were served by plaintiffs with a demand for a jury trial. The appearance Docket shows that the Jury Fee was paid on August 8, 1960 (R. Vol. 1, p. 53). This completed the formalities required of a plaintiff for right to a trial by jury under the Rules of Procedure of the Superior Court of the State of Washington. The motion to strike was still pending when the cause was removed to the District Court by stipulation on October 28, 1960 (R. Vol. 1, pp. 46-48).

Pacific Queen Fisheries v. *Atlas* and other American companies, No. 2543, was commenced in the Superior Court of the State of Washington on May 13, 1960, and removed on May 17, 1960 (R. Vol. 1, pp. 55-60). The motion to remand was denied on July 1, 1960 (R. Vol. 1, pp. 128-129).

On September 26, 1960, it was stipulated and agreed to between counsel in the District Court that the Superior Court action, *Pacific Queen Fisheries* v. *Symes,* be removed to the District Court and consolidated with *Pacific Queen Fisheries* v. *Atlas* for the purpose of trial (R. Vol. 1, p. 223), and approved by the Superior Court on October 28, 1960, (R. Vol. 1, p. 46). At this time (R. Vol. 1, p. 223), the District Court had under advisement plaintiffs' motion for a jury trial and so stated in the same order that approved the removal of the *Symes* case to the District Court and consolidated it with the *Atlas* case for the purpose of trial. This motion was denied on September 28 and the memorandum decision was filed on September 30, 1960 (R. Vol. 1, pp. 224-226).

The right to a trial by jury in a removed action is discussed in *Moore's Federal Practice,* Vol. 5, page 319, where it is pointed out that Rule 81(c) must be considered in connection therewith. That rule reads as follows:

> "(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. *Repleading is not necessary unless the court so orders.* In a removed action in which the defend-

> ant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. *If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it,* if his demand therefore is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition." (Emphasis added.)

As the plaintiffs had already perfected their right to a jury trial in the removed cause and, in addition, thereafter argued in the consolidated cause a previously pending motion for a jury trial, the District Court had no power under Rule 81(c) to deprive plaintiffs of their right to trial by jury in the consolidated cause which they already had in the removed cause.

There was no prejudice to the defendants and none was shown or alleged with respect to either action or the consolidated action. They neither did anything they would not otherwise have done nor refrained from doing anything they should have done.

CONCLUSION

The law of insurance can not be considered, as is the law of torts, an instrument of coercion upon assureds to improve operating practices. It is against the unpredictable happenstance of loss, through whatever set of circumstances set in motion by the laws of cause and effect, that men take out

insurance. If it were the law that marine policies afford no protection against losses having their genesis in causes traceable to men's delicts, these policies would afford but scant protection against maritime disasters.

Plaintiffs purchased coverage in good faith upon which they were entitled to rely and upon which they did rely. Certainly they did not go into the insurance market to buy themselves an overseer. It would be a miscarriage of justice to permit defendants to avoid the policies by means of the inapplicable defenses and strained technicalities which they have raised.

Judgment should be reversed and entered for plaintiffs, together with interest, their costs and disbursements, and attorneys fees.

Dated: New York, New York,
March 8, 1962.

Respectfully submitted,

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